[redacted]

IN THE

Supreme Court of the United States.

EDWARD F. GOLTRA,
Petitioner,

vs.

JOHN W. WEEKS, Secretary of War of the United States, COL. T. Q. ASHBURN, Chief Inland & Coastwise Waterways Service of the United States, and JAMES E. CARROLL, United States District Attorney,
Respondents.

PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward F. Goltra, respectfully presents to this Court this, his petition, for a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, requiring said Court and the Clerk thereof to certify to this Court the record and proceedings of the case in said court wherein your petitioner was Respondent, and the Respondents, John W. Weeks, Secretary of War of the United States; Col. T. Q. Ashburn,

Chief Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, were Appellants, together with the opinions therein for review and determination of said cause by this Court.

Said cause was heard in the United States Court of Appeals for the Eighth Circuit, by Sanborn, Circuit Judge, and Pollock and Symes, District Judges, on appeal from the United States District Court for the Eastern District of Missouri upon a decree and an order rendered and entered, after a hearing, granting a temporary restraining order and mandatory injunction against the respondents herein.

The opinion of the Circuit Court of Appeals was delivered by Pollock, District Judge, and was concurred in by Symes, District Judge, in a separate opinion. Sanborn, Circuit Judge, delivered a dissenting opinion.

The order of Court is as follows:

> "**It is hereby ordered**: That the order for the interlocutory injunction challenged by this appeal be and it is hereby reversed and that this case be remanded to the court below for further proceedings.
>
> "In view of the situation of the parties to this suit and of the property involved herein, and of the probabilities that an appeal to the Supreme Court from the decision of this Court herein will be taken;
>
> "**It is further ordered**: That in case such an appeal is perfected within thirty days after the filing of this order and the indemnifying security, or its equivalent against loss on account of the order for the injunction, is continued, renewed, or otherwise kept in effect, until the decision of the Supreme Court upon the appeal, the mandate of this Court to the Court below shall be withheld and the interlocutory injunc-

tion herein shall continue in force until such decision is rendered and the order or orders of the Supreme Court pursuant thereto are put into effect."

The reasons relied on for the allowance of this writ are:

First: The majority opinion of said Circuit Court of Appeals has decided important questions of law in a way untenable and in conflict with applicable decisions of this Court and in conflict with the weight of authority, to-wit:

(a) That this suit for an injunction against the Secretary of War and his subordinates to restrain them, as individuals, from committing illegal and unauthorized acts of seizing the towboats, barges and other property and commanding the return of the property already taken, which has been and was legally in the possession and control of your petitioner, could not be maintained, and

(b) That such a suit was one, in effect, against the United States which could not be maintained.

(c) That the Secretary of War had the right, in his judgment and discretion, to, arbitrarily, terminate said contract of lease and option to purchase, without affording the lessee an opportunity to be heard.

(d) That the judgment of the Secretary of War is not subject to judicial inquiry, decision, or review.

(e) That by reason thereof the respondents, John W. Weeks, as Secretary of War, Col. T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, were justified in seizing, without legal proceedings, without notice, by coercion, and force of men and arms, said towboats and barges then in the possession and control of petitioner.

(f) That although the Government had, as here disclosed, entered into a commercial enterprise and was interested as a trader in a business venture for profit, still it retained its immunity from suit as a sovereign in a governmental capacity.

(g) By deciding and holding the contract of lease to be a contract with the Government and that the property was and is the property of the United States in its sovereign capacity, although the contract of lease was made with Edward F. Goltra by "Major General Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor," and designated in said lease as "party of the first part," and throughout refers to "him" as the lessor, and relates to and also recites the allotment of $3,860,000 to said Chief of Engineers by the United States Shipping Board Emergency Fleet Corporation for the construction of said fleet.

(h) By interpreting clause 8 of said contract of lease and option as a forfeiture clause with power in the Secretary of War, in his judgment, to declare said contract terminated, and to take, arbitrarily and by force, said property.

Second: The majority opinion of said Court has decided an important question of law in a way untenable and in conflict with the Fifth Amendment of the Constitution of the United States: "No person shall * * * be deprived of life, liberty, or property, without due process of law," to-wit: sustaining respondents' arbitrary seizure of your petitioner's property under circumstances as set forth in Judge Sanborn's dissenting opinion:

> "Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on noncompliance, in his judgment, by plaintiff with any of

the terms of the lease and contract, would be justified in terminating the lease and returning the property to the lessor," is no grounds for "the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3rd, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract and his peremptory demand that the plaintiff surrender the property, his failure to give notice of or an opportunity for a hearing before him by the plaintiff on the question of the latter's compliance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary's letter of March 3rd, 1923, requested such an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday, and the attempt to run it beyond the jurisdiction of the Court below, constituted due process of law."

Third: The majority opinion of said court has decided important questions of federal law as set forth in the foregoing paragraphs which should be settled by this Court.

In this behalf your petitioner states the following facts:

1. During the war between the United States and Germany, as a war emergency, "the United States Shipping Board Emergency Fleet Corporation allotted to the Chief of Engineers the sum of $3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting * * * iron and coal to and from St. Louis, Missouri." At the close of the war said towboats (four in number) and barges (nineteen in number) were in course of construction under contract with the Chief of Engineers of the United States Army. Said towboats and barges were useless as a war emergency in time of

peace, and were of uncertain value for private business undertakings until successfully demonstrated and experimented with.

2. After some negotiations a contract of lease with option to purchase was entered into between William M. Black, Chief of Engineers, United States Army, and your petitioner, on May 28th, 1919.

3. Said contract of lease and option to purchase described the parties as follows:

> "This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors and administrators, party of the second part."

4. Said contract of lease and option to purchase was executed as follows:

> "In witness whereof the parties aforesaid have hereunto placed their signatures of the date first hereinbefore written.
>
> Witnesses: William M. Black (Seal)
> John Stewart, Major General, Chief of Engi-
> Lt. Col of Engineers neers U. S. Army (First Party)."
>
> ———— ————, Edward F. Goltra (Seal)
> Lt. Col., Engrs. (Second Party)."

As to

5. At the end of the said contract of lease and option to purchase are the following notations:

"The insertion of the words 'three or' in the thirteenth and nineteenth lines of page 2, the seventh line of page 3, and the fifteenth line of page 7 are correct and were made before the contract was completed.

William M. Black,
Maj. Gen., Chief of Engrs.,
First Party.
Edward F. Goltra,
Second Party.

"It is further understood and agreed between the said William M. Black, Chief of Engineers, United States Army, and Edward F. Goltra, parties of the first part and of the second part, respectively, of the above contract, that the number of towboats to be supplied under the above contract, denominated 'three or four' therein, shall be at least three, and that a fourth shall be supplied only in the event that four suitable towboats of the general type and power described in the request for proposals now being canvassed for four towboats for the upper Mississippi River can be obtained with the funds available as specified in the second whereas of the above contract, and not otherwise.

Witness:
Lt. Col. of Engineers.
James M. Hoffman,
Capt., Engrs., U. S. A.

William M. Black,

Edward F. Goltra."

6. On May 26th, 1921, a supplemental contract for the erection of unloading facilities was entered into. The beginning of said supplemental contract is as follows:

"Whereas, on the twenty-eighth day of May, 1919,

a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor, representing the United States of America, of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri."

* * * * * * * * * * * *

"Now, therefore, the said contract is, by this Supplemental Agreement between Major General Lansing H. Beach, Chief of Engineers, U. S. Army, and the said contractor, on this 26th day of May, 1921, hereby modified in the following particulars, but in no others:"

7. The supplemental contract was executed as follows:

"This supplemental agreement shall be subject to the approval of the Secretary of War.

"In witness whereof the parties aforesaid have hereunto placed their signatures at the time of execution of this agreement.

Witnesses:

P. J. Dempsey,
As to
Thomas M. Robins,
Major, Corps of Engineers.
As to

Lansing H. Beach,
Major General, Chief of Engineers.

Edward F. Goltra,

Approved May 27, 1921

J. M. Wainwright,
Assistant Secretary of War."

8. Throughout said contracts the lessor is referred to in the personal pronoun, and he is referred to as the party to oversee and supervise the operating conditions, to approve of the insurance companies, to determine the bond, to designate the depository for funds, to inspect the fleet, the accounts, expenses and operating costs, to appoint one

appraiser in the event the option to purchase is exercised and to have said fleet returned to him upon termination of the lease.

9. Part of the consideration set forth in the said contract of lease and option to purchase is as follows:

> "Whereas the said lessee has entered into various engagements and undertakings to increase the pig iron supply as a war measure, which may have created, and according to the contention of the lessee did create, obligations on the part of the United States to the said lessee, but which he entirely releases and discharges in part consideration of this lease, which engagements, undertakings and lease are in furtherance of the original design for the assembling of coal and iron at St. Louis, Missouri, and for the increase of pig iron facilities:"

10. Part of the consideration set forth in the said supplemental agreement is as follows:

> "The lessee will, at his own expense, within eight (8) months from the date thereof, provide the necessary tract of land and runway on which the unloading facilities are to be erected, stand and operate, said tract to be selected by the lessor, subject to the approval of the lessee, and said runway to be built according to plans submitted by lessee and approved by the lessor."

11. The contract of lease is for a term of five (5) years from date of delivery of towboats and barges to the lessee.

12. The option to purchase clause of the contract reads as follows:

> "5. Within three months prior to the expiration

of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee, and one by the said two members, unless they shall fail to agree, in which case the third member shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof to appraise the value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:"

13. The clause relative to the use and operation of the fleet and the rates to be charged reads as follows:

"2 (a) that the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore, coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier."

14. The inspection clause under which the respondents herein claim the right to terminate the contracts reads as follows:

"8. The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions in this lease are fulfilled, and that the crews and other employes are promptly

paid, monthly or oftener; and non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels."

15. The above clause eight (8) is referred to as the inspection clause in the Supplemental Agreement as follows:

"The terms of the original lease as to net earnings (paragraph 3), appraisement and option of purchase, and conditions of purchase (paragraph 5), method of payment in the event of purchase (paragraph 6), inspection (paragraph 8), shall govern so far as applicable and pertinent to the said unloading facilities."

16. Said towboats and barges were not completed and were not delivered to your petitioner herein by the lessor (Chief of Engineers of the United States Army) until July 15th, 1922. Prior to July 15th, 1922, your petitioner complied with the terms and conditions of said contract of lease and option to purchase in the matter of purchasing insurance and a $200,000 bond as therein provided, and complied with the terms and conditions of said supplemental contract by purchasing the tract of land designated by the Chief of Engineers for the erection of said unloading facilities.

17. On July 15, 1922, your petitioner was put in possession and control of said towboats and barges and unloading facilities under said contracts.

18. The unloading facilities were not completed until sometime thereafter and were not completed on March

25th, 1923, the date of seizure, but same had been delivered and were in the possession and under the control of your petitioner.

19. After delivery of the fleet the same had to be tested on the Mississippi River to determine feasibility; alterations and additions had to be made, and further tests made; the tests, experiments, changes, alterations and additions consumed considerable time and caused your petitioner to expend about $40,000 therefor.

20. The navigation season on the Mississippi River closes about December 15th and again opens about the first of March.

21. Your petitioner could not secure commodities to transport at rates equal to the rail or all rail rates. No traffic moves, by barges, on the Mississippi river at rail or all rail rates.

22. Under the terms of the contract of lease, paragraph 2 (a) thereof, your petitioner was restricted to the operation of said towboats and barges in transporting commodities to rates "not in excess of prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War." The Secretary of War, thereunder, exercised, kept and maintained control over the rates to be charged for transportation.

23. Your petitioner, anticipating the delivery of said towboats and barges to him, on March 4, 1921, secured from the Secretary of War written authority to make and fix the rate for transporting all commodities by said towboats and barges at 80 per cent of the rail rates.

24. Acting under said authority to make and fix a rate at 80 per cent of the all rail rate, and anticipating the delivery of said towboats and barges, your petitioner solic-

ited and secured commitments for a large tonnage of various commodities to be transported by said towboats and barges on the Mississippi River and its tributaries.

25. Subsequent thereto, the respondent herein, John W. Weeks, became Secretary of War of the United States.

26. Thereafter the respondent herein, John W. Weeks, as Secretary of War, on May 6th, 1922, withdrew and cancelled said rate of 80 per cent of the rail tariff—and only authorized to operate at regular rail rates. On May 25, 1922, the Secretary of War modified this by authorizing a rate of 80 per cent of the rail rate to certain specific and limited commodities so as not to compete with the Mississippi-Warrior River Service, a barge transportation business engaged in by the United States under the Secretary of War. Under this limited authorization your petitioner could not operate.

27. During the short period of time remaining after making tests and alterations until the closing of the navigation season, December 15, 1922, and under the aforementioned limited rate authority, your petitioner did transport certain shipments of coal and cement.

28. On Sunday, March 4, 1923, without notice, warning or an opportunity to be heard, the respondent, John W. Weeks, Secretary of War, through respondent, Col. T. Q. Ashburn, Chief Inland and Coastwise Waterways Service (the officer in charge of the Government's Mississippi-Warrior River Service) served notice on your petitioner in Washington, D. C., declaring said contract of lease and option to purchase, and the supplementary agreement terminated and demanded the delivery of said property over to said Col. Ashburn immediately, upon the grounds that your petitioner had not operated said fleet as a common carrier.

29. To said notice was attached "memorandum for Col. Ashburn" wherein said Secretary of War directed said Col. Ashburn, in the event your petitioner failed to comply with said demand, as follows:

> "In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property."

30. Under date of March 8, 1923, your petitioner, in writing, refused to comply with said demand, and therein stated:

> "To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have, in face of most unjust interference and restrictions fully complied with all of the terms of my contract, and, further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.
>
> "The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which, as a citizen, I am entitled, and which, in fairness and justice, I now request."

31. No reply was made to your petitioner's aforesaid reply.

32. On Sunday morning between nine and ten o'clock, March 25, 1923, without notice or warning, said respond-

ent, Col. T. Q. Ashburn, accompanied by officers of the Government's Mississippi-Warrior River Service, and a large force of men, on one of its steamers, through threats, coercion, force of arms and force of men, seized the fleet of towboats and barges and immediately removed the same toward the State of Illinois shore side, and down the Mississippi River to avoid the jurisdiction of the United States District Court for the Eastern District of Missouri.

33. On said same Sunday, as soon as your petitioner was advised by his representatives of said seizure, he caused the Bill of Complaint herein to be hurriedly prepared and presented to the Judge of the United States District Court of the Eastern District of Missouri, upon which a Temporary Restraining Order and Order to show cause was issued.

34. To this said respondents filed a motion to dismiss and to quash the temporary restraining order, and also a "Motion and Suggestion of the Attorney General of the United States."

35. On April 30, 1923, said United States District Court for the Eastern District of Missouri overruled said motions.

36. Thereupon respondents herein in the name of the Attorney General of the United States made application to the Supreme Court of the United States, October Term, 1923, for a Writ of Prohibition, which said proceeding was entitled "In the matter of the Petition of the United States of America, as owner of Nineteen Barges and Four Towboats—No. 23 Original." Said writ was denied.

37. Thereafter a hearing for a temporary restraining order and mandatory injunction was had in said United States District Court for the Eastern District of Missouri,

after which the following order was made and entered, Sept. 4, 1924:

> "Ordered that said defendants, their agents and servants and all those acting by or through or for them be and hereby are commanded and ordered forthwith to restore to the plaintiff herein at the port of St. Louis, Missouri, all of said towboats, barges, and other facilities and appliances heretofore seized by said defendants, subject to an accounting to be had for any damage resulting from the use and possession of said boats, barges, tools, and appliances since the taking. It is further
>
> "Ordered, that plaintiff, forthwith, give a penal bond in the sum of Twenty-five Thousand Dollars ($25,000.00) and
>
> "That said temporary restraining order and mandatory injunction remain in full force and effect until final hearing of this cause and until further order of this Court."

38. Thereupon respondents herein appealed from said temporary restraining order and mandatory injunction to the United States Circuit Court of Appeals for the Eighth Circuit.

The questions and propositions of law involved in this case are substantially as follows:

1. The majority opinion of the United States Circuit Court of Appeals for the Eighth Circuit has decided an important question of law in a way untenable and in conflict with the weight of authority in this, to-wit: Said opinion holds that in this cause, wherein the Major General, Chief of Engineers of the United States Army, leased, by authority of law, nineteen barges and four towboats to Edward F. Goltra, and which said barges and

boats had been constructed and paid for out of a fund of $3,860,000 which had been allotted to the said Chief of Engineers by the United States Shipping Board Emergency Fleet Corporation, and which barges and boats were in the possession of the said Goltra under said lease and under which lease said Goltra had certain options or rights to purchase said barges and boats, and under the provisions of said lease said Goltra had laid out and expended large sums of money, that the Secretary of War had the right and discretion to declare said lease at an end and to seize the said barges and boats and to deprive the said Goltra of his rights in them and to them without a proceeding in court, though the said Goltra denied and disputed said right or discretion and that though so disputing said right that said Goltra could not maintain a suit for an injunction against the Secretary of War and his subordinates (who had been directed to begin legal proceedings), individually to restrain them from committing the illegal act of seizing said barges and boats and that such a suit was one in effect against the United States which could not be maintained.

In the case of United States v. Lee, 106 U. S. 109, this Honorable Court held:

> "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed, is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection

of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption, that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

"Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the Courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulate liberty and the protection of personal rights. * * *"

And in the case of the State of Colorado v. Roger W. Toll, decided by this Honorable Court May 11, 1925, the Rocky Mountain National Park, property of the United States, was in the possession of the superintendent, Toll,

who had been appointed by the Government, it was held that an injunction suit could be maintained against the said superintendent individually, the opinion stating:

> "The object of the bill is to restrain an individual from doing acts that it is alleged that he has no authority to do, and that derogate from the quasi sovereign authority of the state. There is no question that a bill in equity is a proper remedy, and that it may be pursued against the defendant without joining either his superior officers of the United States."

2. The concurring opinion of Judge Symes states:

> "In conclusion it must be remembered that the whole object of Weeks in leasing these boats was to have them operated for the benefit of shippers in the Mississippi Valley; that Goltra attempted only two trips to the river and then tied them up at the wharf in St. Louis. The shipping public was complaining of the lack of service so the Government took possession in order to turn them over to a lessee who would give service to the public."

Thus it is stated that the Government had entered into a commercial enterprise and was interested as a trader in a business venture for profit, yet still retained its immunity from suit as a sovereign in a governmental capacity. It has therefore decided an important question of law in a way untenable and in conflict with the applicable decisions of this Honorable Court, and the great weight of authority.

In the case of Bank of the United States v. Planter's Bank of Georgia, 9 Wheat. 904, this Court said:

> " 'It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and

takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.' "

These words are quoted and followed in many cases, e. g.:

Bank of Kentucky v. Wister, 2 Pet. 318;
Briscoe v. Bank of Ky., 11 Peters 256, 323;
Louisville R. R. v. Letson, 2 How. 304, 308;
South Carolina v. United States, 199 U. S. 43.

3. The majority opinion decides a federal question in a way in conflict with the applicable decision of this Honorable Court in the case of Sloan Shipyards Corporation v. United States Shipping Board, 258 U. S. 549, in that the Circuit Court of Appeals holds that although the contract of lease made with Edward F. Goltra by "Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor," and designated in said lease as "party of the first part" and signed "William M. Black, Major General, Chief of Engineers, U. S. Army (First Party)," and the supplemental agreement reading "whereas, on the twenty-eighth day of May, 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor" and signed "Lansing H. Beach, Major General, Chief of Engineers," which contract relates to and cited the allotment of $3,860,000 to the Chief of Engineers by the United States Shipping Board Emergency Fleet Corporation for the construction of the barges and boats leased to the said Goltra, the Government was the owner of said barges and boats, and

that any suit against any officers of the Government with relation to said barges and boats would be construed to be a suit against the Government.

In the case of Sloan Shipyards Corporation v. United States Shipping Board, 258 U. S. 549, this Honorable Court said:

> "This contract was made on February 1, 1919, when the character of the Fleet Corporation had been more fully developed and determined than in the previous case, and purported to be made with the Fleet Corporation—a corporation organized and existing, etc. (hereinafter called the 'Corporation') representing the United States of America, party of the second part. Throughout the contract the undertakings of the party of the second part are expressed to be the undertakings of the Corporation, and it is this Corporation and its officers that are to be satisfied in regard to what is required from the Iron Works.
>
> "The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract."

4. The opinion holds that the Secretary of War, not a party to the contract and not designated as the lessor, had the right, arbitrarily, to declare the lease contract forfeited. In so doing it decided a question in a manner directly in conflict with the decision of this Honorable Court in the case of Sloan Shipyards Corporation v. United States Shipping Board, 258 U. S. 549, cited in the preceding paragraph.

Your petitioner in the brief accompanying this petition will more particularly elaborate upon the foregoing questions.

Your petitioner presents herewith a certified copy of the

entire record in said cause, including the proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, and the opinions of said Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court on day to be designated, a full and complete transcript of record and all proceedings of said United States Court of Appeals for the Eighth Circuit had in said cause, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law and that the said judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit be reversed by this Honorable Court and for such further relief as may seem proper. And your petitioner will ever pray.

JOS. T. DAVIS, and
DOUGLAS W. ROBERT,
Counsel for Petitioner.

State of Missouri, } ss.
City of St. Louis. }

Jos. T. Davis, being duly sworn on oath deposes and says that he is counsel for petitioner, Edward F. Goltra; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the proceedings had, and that the facts in said petition herein stated are true to the best of his knowledge and belief.

JOS. T. DAVIS.

Subscribed and sworn to before me this 7th day of August, 1925.

(Seal)

ETTA MANN,
Notary Public in and for the City of St. Louis, State of Missouri.

My term expires Jan. 10th, 1928.

I hereby certify that I have examined the foregoing petition, and in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

JOS. T. DAVIS,
Counsel for Petitioner.

No. 718

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SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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AUTHORITIES.

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EDWARD F. GOLTRA,
Petitioner.

vs.

JOHN W. WEEKS, Secretary of War of the United States, COL. T. Q. ASHBURN, Chief Inland & Coastwise Waterways Service of the United States, and JAMES E. CARROLL, United States District Attorney,
Respondents.

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF GROUNDS FOR THE WRIT.

These suggestions are filed in support of the Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Eighth Circuit to certify to the Supreme Court, for its review and determination the case of John W. Weeks, Secretary of War, et al., appellants, v. Edward F. Goltra, respondent.

The opinions of the Court below have not yet been officially reported, but are printed in the printed record of this case herewith filed and the same will be found therein. (R., 105.)

The opinions were delivered, the judgment and order of said Circuit Court of Appeals were filed and entered July 23, 1925. (R., 126-141.)

The specific claims advanced, and rulings made in the lower court which are relied upon as the basis for the granting and issuing of this writ of certiorari are:

First: The majority opinion of said Circuit Court of Appeals has decided important questions of law in a way untenable and in conflict with applicable decisions of this Court and in conflict with the weight of authority, to-wit:

(a) That this suit for an injunction against the Secretary of War and his subordinates to restrain them, as individuals, from committing illegal and unauthorized acts of seizing the towboats, barges and other property and commanding the return of the property already taken, which has been and was legally in the possession and control of your petitioner, could not be maintained, and

(b) That such a suit was one, in effect, against the United States which could not be maintained.

(c) That the Secretary of War had the right, in his judgment and discretion, to, arbitrarily, terminate said contract of lease and option to purchase, without affording the lessee an opportunity to be heard.

(d) That the judgment of the Secretary of War is not subject to judicial inquiry, decision, or review.

(e) That by reason thereof the respondents, John W. Weeks, as Secretary of War; Col. T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney, were justified in seizing, without legal proceedings, without notice, by coercion, and force of men and arms,

said towboats and barges then in the possession and control of petitioner.

(f) That although the Government had, as here disclosed, entered into a commercial enterprise and was interested as a trader in a business venture for profit, still it retained its immunity from suit as a sovereign in a governmental capacity.

(g) By deciding and holding the contract of lease to be a contract with the Government and that the property was and is the property of the United States in its sovereign capacity, although the contract of lease was made with Edward F. Goltra by "Major General Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor," and designated in said lease as "party of the first part," and throughout refers to "him" as the lessor, and relates to and also recites the allotment of $3,860,000 to said Chief of Engineers by the United States Shipping Board Emergency Fleet Corporation for the construction of said fleet.

(h) By interpreting clause 8 of said contract of lease and option as a forfeiture clause with power in the Secretary of War, in his judgment, to declare said contract terminated and to take, arbitrarily, and by force, said property.

Second: The majority opinion of said court has decided an important question of law in a way untenable and in conflict with the Fifth Amendment of the Constitution of the United States: "No person shall * * * be deprived of life, liberty, or property, without due process of law," to-wit: sustaining respondents' arbitrary seizure of your petitioner's property under circumstances as set forth in Judge Sanborn's dissenting opinion:

"Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on non-compliance, in his judgment, by plaintiff with any of the terms of the lease and contract would be justified in terminating the lease and returning the property to the lessor," is no grounds for "the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3rd, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract, and his peremptory demand that the plaintiff surrender the property, his failure to give notice of or an opportunity for a hearing before him by the plaintiff on the question of the latter's compliance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary's letter of March 3rd, 1923, requested such an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday, and the attempt to run it beyond the jurisdiction of the Court below, constituting due process of law."

Third: The majority opinion of said court has decided important questions of federal law as set forth in the foregoing paragraphs which should be settled by this Court.

Your petitioner herein submits the following brief as an elaboration upon the foregoing and as presented in the accompanying petition.

AUTHORITIES.

I.

The United States Circuit Court of Appeals for the Eighth Circuit virtually invites and requests that this cause be certified to the Supreme Court for its determination:

Orders of said Circuit Court of Appeals. (R., 141-147.)

II.

The important questions of law herein referred to, and the conflict of opinions rendered herein by the said Circuit Court of Appeals, as well as the conflict with decisions of the Supreme Court and the weight of authority, warrant the granting and issuing of the writ:

The three separate opinions of said Circuit Court of Appeals in the instant case;

(a) Opinion of the Court by Pollock, District Judge. (R., 105.)

(b) Concurring opinion by Symes, District Judge. (R., 126.)

(c) Dissenting opinion by Sanborn, Circuit Judge. (R., 131.)

Ex parte, in the matter of the United States, as owner of Nineteen Barges and Four Towboats, 263 U. S. 389, 393.

III.

This is not a suit against the Government of the United States, and the United States is not a necessary party thereto:

United States v. Lee, 106 U. S. 196;
Shipping Board Cases, 258 U. S. 549;
State of Colorado v. Toll, 15 S. Ct. Reporter, June 1st, 1925, page 581;
In re Ayers, 123 U. S. 443, l. c. 501;
Stanley v. Schwalby, 147 U. S. 508, l. c. 518, also 523, dissenting opinion of Field, J.;
Belknap v. Schild, 161 U. S. 10, l. c. 19;
Tindal v. Wesley, 167 U. S. 204, l. c. 213;
Ex Parte Young, 208 U. S. 123, l. c. 151;
Philadelphia v. Stimson, 223 U. S. 605, l. c. 619;
Louisiana v. McAdoo, 234 U. S. 627, l. c. 629.

IV.

The contract of lease and option to purchase is not a contract with the Government of the United States in its sovereign capacity.

Shipping Board cases (supra).

V.

Where the Government of the United States has entered into a commercial enterprise and is interested as a trader in a business venture for profit, it cannot retain its immunity from suit as a sovereign in a governmental capacity:

Bank of United States v. Planter's Bank of Georgia, 9 Wheat. 904;

Bank of Kentucky v. Wister, 2 Pet. 318;
Briscoe v. Bank of Kentucky, 11 Peters 257, 323;
Louisville R. R. v. Letson, 2 How. 304, 308;
South Carolina v. United States, 199 U. S. 43; Shipping Board cases (supra);
Sec. 201 (e) of the Transportation Act of 1920.

VI.

Clause 8 of the contract of lease does not warrant the construction placed thereon by the Court below to the effect that it is a forfeiture provision granting to the Secretary of War, who is not designated therein, the power to terminate said contract, at his discretion or in his judgment, in an unwarranted and arbitrary manner, and thereby seize the property of the petitioner herein.

Shipping Board cases (supra);
6 Ruling Case Law, 906, Sec. 291;
3 Story's Equity Jurisprudence;
Chapt. XXXVII, 14th Ed., 1918, Sec. 1728.

VII.

The decision of the Court below in sustaining the appellants below deprives your petitioner of his property without due process of law in violation of the 5th Amendment of the Constitution of the United States.

VIII.

The United States District Court for the Eastern District of Missouri, as a Court of Equity, had jurisdiction and authority to restrain these respondents, even though

they were officers of the United States, from wrongful and unwarrantable interference with property of the petitioner herein in an arbitrary, unwarranted and illegal manner, and such relief to your petitioner cannot be defeated upon the ground that the suit is one against the United States:

Osborn v. The Bank of the United States, 9 Wheat. 738;

Noble v. United River Logging Railroad Co., 147 U. S. 165;

Philadelphia Co. v. Stimson, 223 U. S. 605, 613, 619;

Lane v. Watts, 234 U. S. 525;

Payne v. Central Pac. Ry. Co., 255 U. S. 228, 231;

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, l. c. 110.

STATEMENT OF FACTS.

A general statement of the facts is contained in the Petition herewith filed to which these suggestions are directed.

In addition thereto, however, attention is called to a misconception as to certain facts upon which the opinion of the Court below is based.

First: The opinion of the Court by Pollock, District Judge is in error as to this: "The fleet of towboats and barges were completed and turned over to plaintiff as lessee under the contract about July 15, 1921. The facts are that the boats and barges were delivered July 15, 1922, (R., 14, 70), the notice of termination dated March 3, 1923 and served on Sunday in Washington, D. C., March 4, 1923 (R., 19, 67), and the arbitrary seizure, with force and by coercion took place on Sunday, March 25, 1923 (R., 69); the Bill was hurriedly prepared, presented and filed Sunday, March 25, 1923 (R., 1), the tests, experiments and alterations were made subsequent to July 15, 1922 (R., 14, 71), the fleet made two trips (R., 71), and the navigable season closed about December 15, 1922, and reopened about the first of March, 1923 (R., 71).

The majority opinion fails to take into consideration the following facts:

That there was only a short intervening period from time of delivery and close of navigable season during

which to make tests, alterations and changes and to operate.

That the Mississippi River Warrior Service, a government operated barge line was operating on the Mississippi River at rates of eighty per cent of the rail tariff, which was under the control of respondents and for which the instant fleet was desired.

That the petitioner herein could not operate a rate equal to the rail tariff.

That under clause 2 (a) petitioner could only operate as a common carrier "at rates not in excess of the prevailing rail tariffs and not less than the prevailing rail tariffs" • • • "without the consent of the Secretary of War"; • • • "But nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier." (R., 5.)

That the Secretary of War assumed control and maintained the right to fix the rates and the commodities to be transported.

That on March 10, 1921 the Secretary of War authorized the petitioner to operate the fleet, when delivered at rates eighty per cent of the rail tariff. (R., 61.)

That petitioner began soliciting shipments and made commitments under said authority. (R., 16.)

That on March 31, 1922, the Secretary of War denied having granted said rate (R., 62), to-wit:

> "I am told there was recently an interview in the St. Louis Post-Dispatch in which you stated I had authorized you to make rates on the lower Mississippi

at eighty per cent of the railroad rates. I have not seen the interview so I am not clear that what I have stated is definitely correct. But, in any case, I told you at the time I could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges. This line is operated for a definite purpose and should not be interfered with in that operation by any action of the Government.

"I said if there was freight on the lower Mississippi which could not be handled by the present operating line and it could be transported by your barges, in that case I would authorize a rate of eighty per cent of the railroad rate. In making this statement I was assuming that what you told me—that the present line could not handle the material which you mentioned—is a fact; but any rate charged must be agreed to by General Downey and the operators of the present line.

"Your contract calls for a rate not less than the railroad rate without the approval of the Secretary of War and I shall give no approval which does not carry out this general statement."

That on May 6, 1922 the Secretary of War withdrew and canceled said rate (R., 64), to-wit:

"You are hereby notified that under the provisions of paragraph 2 (a) of the certain contract No. E7076 between yourself and Major General William M Black, Chief of Engineers, United States Army, dated May 28, 1919, as supplemented by an amendment thereto dated May 26, 1921, the consent and approval of the Secretary of War heretofore, on the 4th day of March, 1921, given to the operation by you of the vessels covered by and included under the provisions of said contract, at transportation rates equal to 80%

of the prevailing rail tariffs, is hereby withdrawn and canceled as to any and all contracts, agreements or undertakings for transportation on the Mississippi River and its tributaries below the City of Saint Louis, Missouri, hereinafter made and entered into by you.

"From and after this date you are authorized to operate said vessels on the Mississippi River and its tributaries below the said City of St. Louis, only at transportation rates equal to and not less than the prevailing rail tariffs, save and except in such cases, and as to such transactions and commodities as the Secretary of War shall, upon application to him, have previously specifically consented to and approved."

That on May 25, 1922, the Secretary of War gave authority to transport a limited list of commodities (R., 65), to-wit:

"In compliance with the terms of my letter of May 6, 1922, you are hereby authorized to transport the following articles from port to port on the Mississippi River or its tributaries at not less than 80% of the all rail rates:

"Liquids in bulk, including liquid asphalt or road oil, in drums; coal, lumber, sulphur, ties, cement, salt, sand, gravel, crushed rock, and grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity."

"Due to the conditions limiting the amount of grain which may be handled thru New Orleans, and due to the limited elevator capacity at Cairo and St. Louis, you will be required to obtain from Mr. Theodore Brent, Federal Manager, Mississippi-Warrior River Service, or his representative in St. Louis, Mr. J. P. Higgins, the amount of grain you may carry and specific dates upon which you can carry it.

"The officials of the Inland and Coastwise Waterways Service, and the Mississippi Section, have been instructed to co-operate with you to the fullest extent in making the operation of your fleet a success; the only limitation being that you shall not engage in such competition with them as to stifle the success of the Mississippi River Service. You will realize the necessity of the restrictions put upon you in the movement of grain, but the other commodities offered you for transportation exceed all the claims you have heretofore advanced concerning contracts entered into by you for the transportation of any commodities."

That petitioner could not operate said expensive fleet under such limited authority.

Said majority opinion fails to recognize the following facts:

That the Chief of Engineers is designated as the lessor in the contract. (R., 4.)

That under clause 8 the Chief of Engineers, as lessor, is designated to act, and the Secretary of War is given no power or authority thereunder. (R., 9.)

That prior to the seizure, respondent, Col. T. Q. Ashburn, was directed (R., 68) as follows:

"In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property."

AUTHORITIES RELIED UPON BY COURT BELOW.

The majority opinion below cites Wells v. Roper, 246 U. S. 335. A careful reading of this case will disclose an entirely different state of facts and that it is not applicable to the case at bar.

In that case, based upon a contract with the Postmaster General acting for the United States, in its governmental capacity, the contract provided specifically that the Postmaster General or the First Assistant could terminate the contract under this stipulation: "any and all equipment contracted for herein may be discontinued at any time upon ninety days' notice from the said party of the first part," and the "Postmaster General notified plaintiff in writing that it was essential for the purpose mentioned that his contracts should be canceled, etc."

Furthermore, it will be noticed in that case, that in so doing the Postmaster General was acting in an official capacity under a specific appropriation of Congress for the very purpose contemplated in said contract wherein he was given discretionary power under the appropriation.

> "Then the Postmaster General, acting under a provision of an appropriation act approved March 9, 1914, Chap. 33 etc., by which he was authorized in his discretion to use such portions, etc."

As to other cases relied upon we presume to make the statement of United States District Judge Faris, in his first opinion in the instant case, our comment therein:

> "Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally, these

cases are of the type of Wells v. Roper, 246 U. S. 335; Oregon v. Hitchcock, 202 U. S. 60; Naganab v. Hitchcock, 202 U. S. 473; Stanley v. Schwalby, 162 U. S. 255; Louisiana v. Garfield, 211 U. S. 70; Louisiana v. McAdoo, 234 U. S. 627; all of which cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto, held by the United States under allodial tenure as a sovereign, with vessels (vide, The Siren, 7 Wall. 152), captured by it in war, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post-offices and postroads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign."

ADDENDA.

For the information of this Court and as part of these suggestions, we print in the Addenda (1) the "Oral Opinions of the Court (United States District) on motion to dismiss the bill," and on the hearing for a temporary injunction; (2) the dissenting opinion of Sanborn, Circuit Judge, rendered in the court below.

In conclusion, we respectfully submit that the writ of certiorari herein prayed for should be granted and call the Court's attention to the comment of this Court when this case was before this Court upon an application for a writ of prohibition:

> "The merits of the case present interesting questions. The question of remedy is, however, the more insistent. Does the case justify it? Prohibition is a remedy of exigency and in exclusion of other process

of relief. It is directed against unwarranted assumptions of jurisdiction or excesses of it. In some cases there may be instant judgment that such is the situation and the writ granted. In other cases there may be doubt and the writ denied. Ex parte Moir, 254, U. S. 522, 524. And doubt in the instant case would seem to be justified, for two district Courts (referring to the Court below and the district Court for the Northern District of West Virginia in United States Harness Co. v. Graham, 288 Fed. 929), have decided that, under circumstances such as presented in this case, it does not involve or constitute a suit against the United States. And also the writ is to be denied if there be remedy against the action complained of by appeal."

Ex parte, in the matter of the United States as owner of Nineteen Barges and Four Towboats, 263 U. S. 389, 393.

We desire to call attention to the fact that the order of the Circuit Court of Appeals set forth on page 2 of the petition herein has been modified, so that the time to petition this Court for a writ of certiorari has been extended to ninety days from July 23rd, 1925 (R., 147), and that the petitioner has complied with the order in regard to the bond (R., 148).

And we add, in order that there may be no misunderstanding, although it may not be material in the consideration of this case, that the boats and barges have been in active use, and that Mr. Goltra has been operating them upon the Mississippi River ever since the temporary injunction was granted, having been able to do so by getting the consent of the Secretary of War to reduce the rates to a figure somewhat below eighty per cent of the railroad rates (R., 143-4).

Respectfully submitted,

JOSEPH T. DAVIS,
DOUGLAS W. ROBERT,
Attorneys for Petitioner.

ADDENDA.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

JOHN W. WEEKS, Secretary of War of the United States, et al., Appellant,

v.

EDWARD F. GOLTRA, Appellee.

No. 6871

DISSENTING OPINION OF SANBORN, J.

Sanborn, Circuit Judge, dissenting.

When the controversy that resulted in this suit in equity arose, the plaintiff was in lawful possession of the four towboats and nineteen barges. The lease and contract of sale of May 28, 1919, and the delivery of possession of the vessels to him on July 15, 1922, had vested in him the lawful possession of the property and the absolute optional right by a compliance with the terms of the contract to the continuous possession and to the legal title to this

property at any time prior to July 15, 1927, the time of the expiration of the term of the lease and contract of sale. He was in the position of an optional vendee of real or personal property to whom the vendor, bound by his contract to convey on payment by the vendee in the future of the unpaid part of the purchase price, has delivered the possession of the property. In equity he was the optional owner in lawful possession of the property and the vendor held the legal title to it as trustee for him, the cestui que trust.

The contract of lease and sale recited that the barges and towboats were to be constructed by the United States for and adapted to the transportation of iron ore and coal, but when they were delivered to the lessee and optional vendee, about July 15, 1922, they were so defective that he was compelled to expend and did expend $40,000 of his own money to make them operative. That contract provided that he should operate these vessels as a common carrier on the Mississippi River and its tributaries "at rates not in excess of prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War," and that the lessor reserved the right to inspect the plant, fleet and work to see that the terms and conditions of the lease were fulfilled and that "noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor."

On March 3, 1923, the defendant Honorable John W. Weeks, Secretary of War, without notice to or hearing of the plaintiff on the question of his compliance with the terms of the contract, in writing notified him that, in his judgment, he had not complied with them, in that he had failed "to operate the said towboats and barges as a common carrier and in other particulars," but none of these other particulars was described, and he declared the con-

tract terminated and directed the plaintiff to deliver possession of the vessels to the defendant, Colonel T. Q. Ashburn, who was authorized by him to receive and receipt for them. There was a "Memorandum for Colonel Ashburn" attached to this written notice whereby the latter was directed to deliver to the plaintiff in person the notice and to demand the possession of the property, the last paragraph of which read in this way:

"In the event of his failure or refusal to make delivery of the property demanded, you will apply to the United States District Attorney at St. Louis, requesting the institution of legal proceedings for the recovery of said property."

If this direction had been put into effect and such legal proceedings had been instituted, it seems probable that the rights of the plaintiff, the defendants and the United States would have been finally determined before this date and continuing litigation would have been avoided.

On March 8, 1923, the plaintiff in writing answered the demand for possession of the property. The pertinent portion of that answer was in these words:

"* * * Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have, in face of most unjust interference and restrictions, fully complied with all of the terms of my contract, and, further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

"The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has

in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which, as a citizen, I am entitled, and which, in fairness and justice, I now request.

Very respectfully yours,

EDWARD F. GOLTRA."

The record discloses no reply to this answer and courteous request for a hearing, but without either on Sunday, March 25, 1923, the defendants, without the consent and against the protest of the plaintiff's agents in possession of the vessels, with a coercing force of men, took possession of the boats and barges at St. Louis, Missouri, and ran them down the river and held them upon the Illinois side thereof in the belief that the District Court below had no jurisdiction over that portion of the Mississippi River between Missouri and Illinois adjacent to the Illinois bank. As soon as this sudden Sunday seizure came to the knowledge of counsel for the plaintiff they prepared and presented to the Court below his bill in equity against the defendants, wherein he prayed for a restraining order and an interlocutory injunction against them for the purpose of holding the property in the possession of the plaintiff in the state in which it was before the sudden Sunday seizure, until the claims of the respective parties thereto could be fairly heard, considered and decided.

The only specific charge in the demand for possession of these vessels was that the plaintiff had not operated the vessels as a common carrier. In his bill in equity the plaintiff alleged that by the provisions of the lease and contract the defendant, the Secretary of War, had the control of the rates which the plaintiff might charge for transportation of commodities by the use of these vessels,

that he obtained contracts for the transportation of immense quantities of commodities at reasonable rates, but that the defendant, the Secretary of War, by the use of the power over his rates vested in him by the lease and contract prohibited him from operating or refused him the necessary permission to carry commodities at operative rates either as a common carrier or as a private carrier, and thereby arbitrarily deprived him of the opportunity to carry out his contracts with shippers and made it absolutely impossible for him to operate the vessels either as a common carrier or otherwise.

The plaintiff prayed for an immediate restraining order an interlocutory injunction against the sudden seizure, removal and possession of this property by the defendants and for an ultimate determination by the Court below of his right to the possession and his equitable interest in this property. On this bill and the facts which have been recited his counsel immediately invoked the exercise by the Court below of its judicial discretion to preserve the status and possession of this property by its restraining order and its interlocutory injunction as they existed prior to the defendants' seizure until there could be a hearing, consideration and decision by the Court of some of the rights and equities of these parties. The plaintiff was met not by answers by the defendants to the merits of the bill, but by a claim in their returns to the order to show cause why the injunction should not issue that the Court had no jurisdiction of the suit because the United States was a necessary party to it and by a claim that the Mississippi-Warrior Service, a barge line in which the United States was operating on the Mississippi River and to prevent the plaintiff's competition with which he alleges in his bill he was informed that the Secretary of War had prevented his use of operative rates, had offered to use his barges and towboats and to pay him fair compensation for such use. But his acceptance of such an

offer would not have constituted a performance of his contract to operate these boats and barges as a common carrier or otherwise. He was also met by the suggestion of the Attorney General of the United States, that the Nation was a necessary party to this suit, and, by his motion, appearing only for the purpose thereof, to dismiss this suit on that ground. The district judge below patiently heard the claims and arguments of the parties to this suit, deliberately and exhaustively considered them, denied the motion to dismiss the suit and granted the restraining order and the interlocutory injunction and wrote careful opinions in which he clearly set forth his reasons for his action.

The case is in this court on an appeal from his order granting the interlocutory injunction. The decisive question presented to him upon the application for that injunction was, whether or not in the exercise of his judicial discretion he ought or ought not by his injunction to hold these vessels temporarily until there could be a fair hearing and just decision of some of the important issues in this case in the position and situation in which they were when defendants seized them. By the established principles and rules of equity jurisprudence the authority was granted to and the duty, which he could not lawfully renounce or evade, was imposed upon him, and was not granted or imposed upon this court or its members, to decide this question according to his judicial discretion. Denver & Rio Grande R. R. Co. v. United States, 124 Fed. 156, 160. And the question for this court in this case is not whether or not it or its members would have exercised his judicial discretion in the way the judge below exercised it, but is only whether or not he improvidently, illegally or abusively exercised that discretion. Stearns-Rogers Mfg. Co. v. Brown, 114 Fed. 939, 941, 942, and cases there cited; Denver & R. G. R. R. Co. v. United States, 124 Fed. 156, 160.

An indisputable rule for the guidance of the Court below in the exercise of his sound judicial discretion in this case was and is that an interlocutory injunction maintaining the existing condition of the property may properly issue whenever the questions of law or fact to be ultimately determined in the suit are grave and difficult and injury to the moving party will be immediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and may well be indemnified by a proper bond if the injunction is granted. Georgia v. Brailsford, 2 Dallas 402, 406, 407; Magruder v. Belle Fourche Valley Water Users Assn., 219 Fed. 72, 82; Denver & Rio Grande R. R. Co. v. United States, 124 Fed. 156, 161; City of Newton v. Levis, 79 Fed. 715, 718; Allison v. Corson, 88 Fed. 581, 584; Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939, 944; Harriman v. Northern Securities Co., 132 Fed. 464, 476, 477, 480, 485; Carpenter v. Knollwood Cemetery, 188 Fed. 856, 857; Wilmington City Ry. Co. v. Taylor, 198 Fed. 159, 198; Chew v. First Presbyterian Church, 237 Fed. 219, 222; American Smelting & R. Co. v. Bunker Hill & S. Min. & C. Co., 248 Fed. 172, 182. The district judge without doubt followed this rule. He took an ample indemnifying bond as a condition of the issue of the injunction and the question of jurisdiction alone seems to have been sufficiently grave and difficult in view of the circumstances surrounding the seizure by the defendants to warrant his action. In Ex parte In the Matter of the United States, as Owner of Nineteen Barges and Four Towboats, 263 U. S. 389, 393, the Supreme Court denied an application of the United States for a writ of prohibition to forbid the district judge below from enforcing his injunction against the defendants in the case in hand on the ground that the United States was a necessary party to this suit, and said:

"The merits of the case present interesting questions. The question of remedy is, however, the more insistent. 100, 101; Stearns-Roger Mfg. Co. v. Brown, 114 Fed. 939,

Does the case justify it? Prohibition is a remedy of exigency and in exclusion of other process of relief. It is directed against unwarranted assumptions of jurisdiction or excesses of it. In some cases there may be instant judgment that such is the situation and the writ granted. In other cases there may be doubt and the writ denied. Ex parte Muir, 254 U. S. 522, 524. And doubt in the instant case would seem to be justified, for two district courts" (referring to the court below and the district court for the Northern District of West Virginia in United States Harness Co. v. Graham, 288 Fed. 929) "have decided that, under circumstances such as presented in this case, it does not involve or constitute a suit against the United States. And also the writ is to be denied if there be remedy against the action complained of by appeal."

Moreover, the United States acts and can act, contract and estop itself only by the acts, contracts and estoppels that are authorized or wrought by its officers or agents. In the opinion of the writer by their action in this case the United States made William M. Black the lessor and vendor of the property, vested the legal title to it in him, and the possession and equitable title in it in the plaintiff, represented and held him out as competent to make the terms of the lease and contract obligatory upon him and upon the property and enforceable by the courts in suits against him and his assigns without making the United States a party to such litigation. It does not appear and it is improbable that the plaintiff would ever have made this lease and contract with United States, reserving to itself the right to exempt itself and the property from the jurisdiction and power of the courts to enforce the terms of the contract obligatory upon it, and it seems to the writer that the United States and the lessor Black and his successors in interest are estopped by this lease and contract and their acts in placing and holding out the property as subject to its enforceable terms from preventing the plaintiff from protecting his rights and interests therein by suits against Black, the lessor, and his assigns

on the ground that the United States is a necessary party thereto. If, on the other hand, the United States or the defendants, by the plea that the former is a necessary party to all suits to enforce or protect the rights of the plaintiff in this property, its possession, the lease and contract concerning it, and by the refusal of the United States to become a party to any such suits or to bring suit itself, may defeat all such suits without regard to their merits, the plaintiff is left practically remediless and his lease and contract become practically a deceitful sham. Again, the lease and contract of sale and the rights of all parties in interest thereunder arose from and evidence business or commercial transactions. In none of them was or is the United States acting as a sovereign in governing the Nation or the people of the Nation. The entire transaction and any interest it may have in it and the property involved as against the plaintiff is a commercial and business and not a governmental matter. As against him it stands in the relation of a private party divested of its privileges and immunities as a sovereign, and, hence, of its privilege of exemption from suit against the party it made the lessor in this contract and amenable to the suits to enforce it. United States v. Planter's Bank of Georgia, 9 Wheaton 904.

Moreover, the jurisdiction of the court is not the only question in this case. On the day this suit was commenced and for more than a year before that day, the vessels were in the possession of the plaintiff under the lease and contract of sale, which contained the provision that noncompliance by the lessee in the judgment of the lessor, William M. Black, Chief of Engineers, directed by the Secretary of War to represent the United States, with any of the terms or conditions of the lease would justify his terminating and returning the property to the lessor. It will be noticed that the only condition that would justify the termination of the lease and the return of the property to the lessor was the noncompliance by the lessee in the

judgment of the lessor Black with the terms of the lease, while the defendants' claim to possession rests on noncompliance in the judgment of Honorable John W. Weeks, Secretary of War. The large value of the property subject to this lease and contract, the serious effect of the decision to be rendered by the judgment of Mr. Black, leave no doubt in the mind of the writer that the plaintiff entrusted this decision to and relied upon the individual wisdom, experience, knowledge, just and deliberate fairness of Mr. Black. The record does not disclose any decision of this question of noncompliance by him or any consent or agreement by the plaintiff to substitute the judgment of Honorable John W. Weeks, Secretary of War, or of any other person or officer for that of Mr. Black, and it seems to the writer that the judgment of Mr. Weeks, the Secretary of War, was not binding upon the plaintiff, was unauthorized and ineffective. When two opposite parties agree to submit a controversy between them to the judgment of a chosen arbiter in whose fairness, wisdom, deliberation and discrimination they have confidence and to abide by his decision, the consent and agreement of both is indispensable to the substitution of another individual as arbiter in his place.

Again, the possession of this property, the optional right to purchase it on the terms prescribed by the contract, each of them constituted valuable property of the plaintiff vested in him under the contract. If the authority to take this property from the plaintiff when in his judgment the latter failed to comply with any of the terms of the lease and contract had been given to Honorable John W. Weeks, Secretary of War, as in the opinion of the writer it was not, the exercise of that authority and the taking of the possession and the property would have been conditioned by the fair, deliberate and judicial exercise of his judgment after reasonable opportunity for the plaintiff to present the pertinent facts and to be heard concerning his compliance with the terms of the contract.

An arbitrary declaration or decision of the Secretary that in his judgment the plaintiff had failed to comply with the terms, without prior notice to him of the Secretary's proposed consideration of that question, without opportunity for him to present to the Secretary his claim that he had complied and the facts and reasons upon which he based that claim and without thoughtful, fair and deliberate consideration of those facts and reasons before forming his judgment, it seems to the writer would not have warranted a judgment by the Secretary that the plaintiff had not complied with the terms of his contract. The plaintiff alleges in his complaint that no such notice or opportunity for him to present the facts and reasons why he had complied was given to him before the Secretary formed his alleged judgment, nor before his seizure of the property, although by the plaintiff's letter to the Secretary of March 8, 1923, he courteously requested such a hearing by the Secretary.

The 5th Amendment of the Constitution of the United States states: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *". This provision of the Constitution forbids citizens, officers, courts, and the United States itself, from depriving any person of his property without due process. Notwithstanding the provision in the lease and contract that William M. Black, the lessor, on noncompliance, in his judgment, by the plaintiff with any of the terms of the lease and contract would be justified in terminating the lease and returning the property to the lessor, the writer is unable to bring his mind to the conclusion that the acts of the defendants in this case, the notice of Honorable John W. Weeks, Secretary of War, of March 3, 1923, that, in his judgment, the plaintiff had not complied with the terms of the lease and contract and his peremptory demand that the plaintiff surrender the property, his failure to give notice of or an opportunity for a hearing before him by the plaintiff on the question of the latter's compli-

ance with the terms of the contract, either before or after the plaintiff by his answer to the Secretary's letter of March 3, 1923, requested such an opportunity and hearing by his letter of March 8, 1923, the sudden, coercing seizure and taking from the plaintiff of much of this property on Sunday and the attempt to run it beyond the jurisdiction of the court below, constituted due process of law. To the writer they look more like an attempt to avoid or evade due process of law.

The questions of law and equity to which reference has now been made in the mind of the writer are grave and difficult and, in view of them, the judge below was required to and did exercise his judicial discretion in issuing the interlocutory injunction. On this appeal from the order for its issuance the only question judicable by this court is, whether or not the order for the injunction and the record in this case evidence an unlawful, improvident or abusive exercise of his sound judicial discretion. As has been said earlier in this opinion, the law imposed upon him the duty to exercise this discretion and the responsibility for its exercise and left him wide latitude for action within the rules prescribed for his guidance. Neither that discretion nor the exercise of it was entrusted to this appellate court or to either of its members and, in the opinion of the writer, it ought not to interfere with that exercise by the judge below to whom it was entrusted, unless an improvident, careless or unreasonable exercise of it, violative of the rules of law which should have guided his action, has been committed. Blount v. Societe Anonyme Du Filtre, etc., before Circuit Judges, afterwards Justices of the Supreme Court, Taft and Jackson, 53 Fed. 98, 99, 941, 942. For the reasons stated above, the writer is not convinced that anything of this nature characterized the action of the court below in the granting of this injunction and he is unable to resist the conclusion that the order for it ought to be affirmed.

DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

EDWARD F. GOLTRA, Plaintiff,

vs.

WEEKS, ET AL., Defendants.

In Equity No. 6639

ORAL OPINION OF THE COURT ON MOTION TO DISMISS BILL.

FARIS, J.

Plaintiff entered into charter-party, executed by the Chief of Engineers of the United States Army for the leasing or chartering of nineteen barges and four towboats, for a period of five years, with the option in lessee to purchase these vessels at the termination of the charter-party.

Upon completion of the construction of these vessels they were delivered to the plaintiff, and since have been (until the time hereinafter mentioned) in his possession, and until that possession was interfered with by the de-

fendants in the manner hereinafter more specifically set out.

The parties to this lease or charter-party are recited in the instrument thus:

> "This lease, made this 28th day of May, 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee * * * party of the second part."

Plaintiff has sued here for an injunction, both to prevent further interference with his possession of these vessels, and to compel the restoration of them to his possession, charging in this behalf that, being on Sunday, March 25, 1923, in the peaceable and lawful possession of these vessels, that on said date defendant, Ashburn, acting under alleged orders of the defendant, Weeks, forcibly, and without warrant of law, and without due process, or any process of law whatever, came upon said vessels and drove off the servants and employees of plaintiff then in charge thereof, and took and towed these vessels down the Mississippi River, in an effort to get them beyond the jurisdiction of this Court; that such act of the defendant, Ashburn, and the defendant, Weeks, if, in fact, he ordered it to be done, is in contravention of the rights of plaintiff, for that plaintiff's property may not be taken from him without due process of law, and without any process of law whatever, and in contravention of the charter-party under which plaintiff got and held these vessels, and in contravention of the constitutional rights of this plaintiff.

Defendants, Ashburn, and Carroll, as District Attorney

of the United States (the latter of whom is a mere formal party), were duly served with process. Defendant, Weeks, has voluntarily entered his appearance, and all of these defendants have moved to dismiss the bill of complaint, for that the United States, as the alleged owner of the vessels in dispute, and as the actual lessor thereof, is a necessary party defendant, without whose presence this action cannot proceed, and since the United States cannot be sued without its consent, this action must fail.

It was suggested on oral argument, that since the contract of charter reserves to the lessor the right to terminate the lease at any time for noncompliance with any of the terms or conditions thereof, whenever in the judgment of the lessor such noncompliance exists, such taking of the vessels was lawful, and no action whatever will lie against either defendants, or against the United States or against anyone else. This oral contention is not referred to in the motion before me, and scant consideration is devoted to it in the briefs. In any event, I think it may be dismissed with the suggestion that the judgment to be exercised by the lessor could not be exercised arbitrarily, or whimsically, or baselessly, and utterly without the existence of any breach on plaintiff's part, as the bill here alleges.

Upon the motion it is contended by defendants, that not only does the language of the charter-party make plain that the United States is the lessor, but that inherently the relief which this Court must afford, if it give any, requires that the United States be a party, since valuable alleged vested rights of the latter must of necessity be determined as a condition precedent to the giving of any relief; that the charter-party itself, eliminating merely parenthetical recitations of the names of those representing it and designated to act for it, clearly names the United States as the lessor. If the clause designating the

parties stood alone, the correctness of this contention would have to be conceded. Such doubt as is thrown upon its correctness, arises from the uniform use of the personal pronoun "he" in designating the lessor, and from the statutory and fact history of these vessels.

If the United States is the lessor, then plaintiff could not be heard to dispute its title, and the case must be dealt with upon the question whether this Court can afford any relief unless the actual lessor is before the Court as a party. Clearly, no permanent order of injunction can be entered here until it is determined whether the law and the facts adduced furnish a warrant for the judgment exercised by the Secretary of War in attempting to declare the charter-party at an end, or whether, if the facts do not warrant such action, a proper legal construction of the terms of the charter-party warrant such cancellation by the Secretary of War, absent any sufficient defaults on plaintiff's part in carrying it out.

I think it follows, that the lessor must be before the Court before the Court can dispose of the case, or the law must be held to be that the presence of the lessor in court is not necessary, even when valuable rights of the lessor are being determined, when such determination becomes necessary in order to protect the citizen in his constitutional rights against the flagrant violations of those rights by the officers who assume to act for the real lessor.

Reference to the origin and history of the money with which the vessels in dispute were built; to the statutes under which they were built, and to the statutes which provided for their control and ultimate disposition, may serve to throw some light upon the identity of the lessor.

The charter-party says, and the bill alleges (and by the bill, under the law, I am bound, for the uses and

purposes of this motion to dismiss, and this is so, whether the allegations of the bill be true as a matter of fact or not), that all the money used to construct these vessels was furnished by the United States Shipping Board Emergency Fleet Corporation to the Chief of Engineers of the United States Army.

The Fleet Corporation was organized as a quasi private corporation (though, essentially, it was a public corporation) under the laws of the District of Columbia, on the sixteenth day of April, 1917. All of the fifty million dollars of capital stock of the Fleet Corporation was subscribed, taken and owned by the United States (Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 566).

By the act of Congress of June 5, 1920 (41 Stat. 988) the Fleet Corporation was continued in existence, but the title to practically all of the boats, barges, ships and vessels formerly owned and held by the Fleet Corporation was transferred to the United States Shipping Board, which is a mere arm, or administrative bureau of the United States.

However, I am not able to construe the great mass of confusing statutes (confusing, I trust, because of lack of time of this Court, when faced by multitudinous duties, to properly read and understand them), which dealt with the many transportation facilities, by land and water, in an effort to unscramble them following the Great War, as including the vessels here in dispute among those which were transferred to the Shipping Board. On the contrary, I think it is clear that the title to them was left in the Fleet Corporation (so far as title vested in such Fleet Corporation by reason of its furnishing the money with which they were constructed), and, that, likewise the custody and control over them was left where the old statutes

and existing contracts about them had placed such custody and control.

For the Act of June 5, 1920, excepted these vessels from the transfer to the Shipping Board by a proviso to Section 4 of said Act, which proviso reads:

> "Provided: That all vessels * * * assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction, or under contract by the War Department, shall be exempt from the provisions of this Act."

Since the vessels in dispute were not only "vessels assigned to inland waterways," but they were still in course of construction, as also under contract, when the Act of June 5, 1920, was passed, by the War Department, to plaintiff here; for, on the second of the above propositions the bill before me says:

> "These vessels were not completed until long after said date (that is to say, May 28, 1919, the date of the contract) and were not delivered to plaintiff until July 15, 1922."

Whether this allegation is true or not, does not, of caurse, concern me now, because I am bound (as heretofore said) by what the petition alleges, so far as the motion to dismiss, at least, is concerned.

I am of opinion, then, that the title and ownership of these vessels (again, so far as such title and ownership could be predicated on the source of the money used to build them) was left by the Act of June 5, 1920, in the Fleet Corporation, and that the custody and control over them was in the War Department; that this custody and

control in the War Department arose solely by reason of the fact that the $3,860,000.00 with which they were constructed, had been paid by the Fleet Corporation to the Chief of Engineers of the United States Army, and, since the Chief of Engineers of the United States Army was subordinate to, and acter under orders of the War Department. So far as I have been able to see, this chain of circumstances, and this alone, puts the custody and control of these vessels in the Secretary of War.

Some corroboration of this view is lent by some of the provisions of the so-called Transportation Act, of February 28, 1920 (Section 201, Act of February 28, 1920). By the provisions of the latter Act, all boats and vessels on inland waterways, which had come into the control of the United States by virtue of the provisions of Paragraph 4, Section 6 of the Federal Control Act, or which had been built with any money out of the five hundred million dollars revolving fund provided by Section 6, supra, were transferred to the custody and control of the Secretary of War. But these vessels were not obtained pursuant to the provisions of Paragraph 4, Section 6 of the Federal Control Act, nor were they built out of any part of the revolving fund provided in said section 6 of the Federal Control Act.

This view is corroborated by a further provision of Section 201 of the Transportation Act, which does specifically deal with and refer to the vessels in dispute. This is clause (d) of said Section 201, which reads thus:

> "Any transportation facilities owned by the United States and included within any contract made by the United States, for operation on the Mississippi River above St. Louis, the possession of which reverts to the United States at or before the expiration of such

contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above St. Louis."

A further provision of said Section 201 of the Transportation Act, contained in clause (e) thereof provided, that all merchant vessels owned by the United States, in whole or in part, when operated by the Secretary of War, or by the Shipping Board, should be subject to all laws, regulations and liabilities, affecting, or applicable to, privately owned merchant vessels. But I put no stress upon this, for it so clearly limits the laws, regulations and liabilities to admiralty and maritime regulations and liabilities, as that it can furnish no light here.

Moreover, this view is strengthened, and the application of even admiralty laws is modified, by the provisions of the Act of March 9, 1920 (41 Stat. 525) whereby, *inter alia*, it is provided, that no vessel of the United States, or of any corporation in which all the capital stock is owned by the United States, shall be proceeded against by any seizure in admiralty or *in rem*.

The above Act of March 9, 1920, recognized and dealt with the fact that when it was passed there were still in existence boats and vessels, the title and ownership whereof was in a corporation wherein all the capital stock was owned by the United States. This affords an additional reason for the view I have already expressed, that the Transportation Act did not transfer either the title, custody or control, of these vessels to the Secretary of War, but left such title, custody and control (particularly title) where they had always been. There can be, I think, no doubt that the Act of June 5, 1920, already discussed, did not transfer the vessels to the Shipping Board.

Since, from the view above expressed to the specific

application of clause (d) of Section 201, *supra*, of the Transportation Act, to the vessels here in controversy, it may be argued, that this language completely forecloses any contention that the United States is not the owner of these vessels, I may observe in passing, that there can be no doubt, that the United States is the beneficial owner of them. It owns them because it owned and now owns, all of the capital stock of the Fleet Corporation, which furnished the money to build them, and because the United States appropriated all the money to the Fleet Corporation, which the latter ever used or ever had. But, in a sense, the United States was a *cestui que trust* of these vessels, holding, as said, the complete beneficial title thereto, while the Fleet Corporation, a *quasi* private corporation, was the trustee holding the legal title.

In such situation, both Congress and the United States dealt with these vessels as if the United States not only was the absolute owner of them (as it was, in effect), but had the legal title to them, also absolutely.

If the statutes above considered have been correctly interpreted by me; if I have not overlooked, in the confusing mass of statutes passed in an effort to return to prewar normalcy, and in the face of lack of time for careful inquiry incident to the hundreds of other pressing matters and duties confronting me, some applicatory statute, I think a few enlightening principles have been established. These are:

(a) That the vessels here in controversy were built with money furnished by the United States Shipping Board Emergency Fleet Corporation.

(b) That the said Fleet Corporation was a *quasi* private corporation, in which all of the capital stock was owned by the United States;

(c) That all of the money with which the Fleet Corporation operated, came either out of the proceeds of the sale of certain Panama Canal bonds (Act of September 11, 1916, 39 Stat. 728), or was appropriated to the Fleet Corporation by Congress from the revenues of the United States, by the Act of March 1, 1918 (40 Stat. 438) or, by the Act of July 1, 1918 (40 Stat. 634);

(d) That this money which so built these vessels, was turned over by the Fleet Corporation, for this purpose, to the Chief of Engineers of the United States Army, who is an officer of the United States, acting under and by orders from the Secretary of War;

(e) That these vessels being thus created and held, were chartered to plaintiff by the Chief of Engineers of the United States Army, who acted in such behalf by direction of the Secretary of War;

(f) That these vessels, being so under contract, did not pass to the Shipping Board, or to the custody and control of the Secretary of War, unconditionally;

(g) And that, the Secretary of War will only obtain unconditional custody and control of them when they shall have reverted to the United States, at or before the expiration of the contract existing, and here in question. Of course, it is not intended to be said, that since somebody must, in case of exigencies, act for the United States, that the Secretary of War has no power so to act.

In the late case decided by the Supreme Court of the United States, it was held that the Fleet Corporation could be sued, and that a suit against it was not a suit against the United States, within the rule that a sovereign may not be sued without its consent. (Sloan Shipyards v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549).

This case here at bar, it is true, is not an action against the Fleet Corporation directly, but it is an action concerning vessels constructed with the funds set aside for the Fleet Corporation. Neither is it a suit against the United States, directly. On the face of it, the action is no more directly against the United States than it is against the Fleet Corporation. Indirectly, it is against the Fleet Corporation, and not against the United States.

Numerous cases, some of which are relied on by counsel for defendants as on all fours with the case at bar, are called to my attention. Generally, these cases are of the type of Wells v. Roper, 246 U. S. 355; Oregon v. Hitchcock, 202 U. S. 60; Naganab v. Hitchcock, 202 U. S. 473; Stanley v. Schwalby, 162 U. S. 255; Louisiana v. Garfield, 211 U. S. 70; Louisiana v. McAdoo, 234 U. S. 627, all of which were cases dealing with rights, property and attributes of the United States accruing to it in its strict capacity as a sovereign. These cases dealt with lands, or titles thereto, held by the United States under allodial tenure as a sovereign, with vessels (*vide,* The Siren, 7 Wall. 152) captured by it in war, with import duties levied pursuant to constitutional grant of power, with matters pertaining to post-offices and post-roads, and others of a similar sort had, done and transacted by the United States pursuant to constitutional grant of power in its strict governmental capacity as a sovereign.

The case of Kaufman v. Lee, 106 U. S. 196, where suit was brought in ejectment against Kaufman, as the officer, agent and terre-tenant of the United States, which was the owner of lands held by it in fee, as a national cemetery, and for use in some obscure way as a military reservation, and Stanley v. Schwalby, 162 U. S. 255, wherein a like suit to recover possession of land held for a fort by the United States, was brought against the terre-tenant, seem to illustrate the distinction.

In the former case it was said the suit could be maintained without joining the United States as a party, although the United States contended that it owned the land in controversy in fee. In the latter case it was held that the suit was one against the United States, and that it could not be maintained.

It is true the Supreme Court of the United States does not put the distinction on any such ground as that referred to above, but to me it seems that the distinction perhaps exists. The difference between the two cases, as they are distinguished by the Supreme Court in the Stanley case, is that in the Lee case the title of the United States was clearly bad, and that of the plaintiff therein clearly good; while in the Stanley case the converse was, respectively, present. Such a distinction seems unfortunate, for it would seem that, since the United States cannot be sued without its consent, no Court could ever get to the point of ascertaining whether the cause of action against it was good or bad. Having no jurisdiction to entertain the action at all, it would, by the same token, have no jurisdiction to ascertain whether the plaintiff had, or had not, a good cause of action, and the United States, the real defendant, a bad or worthless defense, which, after all is said, is the only subject of a lawsuit.

But the Lee case, *supra*, (Kaufman, the terre-tenant, alone was sued, and the United States, though it defended the action, expressly declined to submit to the jurisdiction of the trial court, though after adverse judgment below, it took an unwarranted writ of error) does hold that when the United States, acting from necessity through its officers, since it cannot function otherwise, takes the property of a citizen without due process of law, and without just compensation, and in utter disregard of right, of law and of constitutional guaranties, and so taking such property, attempts to retain it for and on the alleged behalf of the United States, the lawfulness of a possession so

acquired, and the title to property so illegally, unrighteously and unjustly obtained, may be inquired into by the courts, even though the United States be not made, and cannot be made, a party to the action in which such inquiry is had.

This is, I think, the real, legal distinction between the Lee case and the Stanley case. So, should I in haste have erred in holding that the United States is not the lessor, by the terms of the charter-party, the Lee case is yet authority for the view that, by flagrant acts of its officers, through whom it alone can function, the United States may, in a sense, be estopped from benefiting by such unlawful and unconstitutional acts.

I am of opinion, that the facts alleged in the bill, when viewed in the light of the statutory history of the alleged title to these boats in the United States, furnish a sufficient reason why the United States is not a necessary party. Everybody, of course, concedes that, if it is a necessary party, then this Court has no jurisdiction; that it cannot be proceeded against without its consent, and that this consent, it is likewise conceded, has not been vouchsafed in this case.

But even if this fact of title in the United States be conceded as being absolute, even if the Sloan Shipyards case be not controlling, the right to the possession of these boats was in the plaintiff, until that right was by wanton force interfered with, without due process of law, and in utter disregard of the law, and of its processes. Not only were the boats taken, as the petition alleges, without any process of law, but they were taken in utter disregard of the instructions of the Secretary of War, which instructions ordered defendant, Ashburn, who actually did the taking, to institute legal proceedings for their recovery, in the event that plaintiff refused to deliver them up. Such proceedings as were actually ordered by the Secre-

tary of War, would have constituted that due process of law, which the Federal Constitution vouchsafes to even the meanest of its citizens.

What was said by Mr. Justice Miller as to the facts and situation in the Lee case, particularly and peculiarly applies to the facts alleged in the petition here. That was a case, in the opinion of this Court, not nearly so flagrant as the one before me, but Mr. Justice Miller saw fit to characterize what was done in that case, in this pertinent and apposite language:

> "No man," said Mr. Justice Miller, "in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to the supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this Court is crowded with controversies of the latter class.
>
> "Shall it be said, in the face of all this, and of the acknowledged rights of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress, and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of a Government without lawful authority,

without process of law, and without compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty, and the protection of personal rights."

But little can be added to language like this. It fits the case at bar, as the case at bar is pleaded, and with the latter, at this stage, I repeat, I am alone concerned. Certainly no Government, which with mighty hand compels its citizens to abide by the law, ought itself, in time of peace, to break its own laws, or refuse to follow itself that law which it compels others to abide by. Neither can the Government afford to take the unlawful fruits accruing from illegal acts perpetrated by those who assume to act for it, and in its name. Even if it should be conceded, for the sake of argument, that no action could be maintained by plaintiff, nor anyone else, affecting the title or possession of these vessels in dispute, or affecting the charter-party, or its construction, without the United States were a party, if defendants had come lawfully into possession of them, yet this would not at all militate against the view that a possession obtained, as here, can be examined into by the courts. Since the taking is alleged to have been done by force, and unlawfully, without due process of law, and without regard to the law, and without regard to the instructions, even of the Secretary of War, who advised, and, until lately at least, countenanced only lawful repossession, the presumption ought to be entertained, that the acts of defendant were not done by and with the consent of the United States, but, on the contrary, were done against its will and consent.

It is persuasive, that a similar view, in a very similar

case, has lately been taken by Judge Baker, United States District Court of the Northern District of West Virginia.

However, if no other reasons could be given for this view, except those of a profound respect for the law, and its processes, and a profound respect for the honor and dignity of this government, these alone ought to suffice.

Without more, I am of the opinion that the motion to dismiss on the grounds now urged by defendants, ought to be overruled, and so it will be ordered. April 30, 1923.

St. Louis, Missouri.

DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

EDWARD F. GOLTRA, Plaintiff,

vs.

WEEKS, ET AL., Defendants.

No. 6639
In Equity

ORAL OPINION OF THE COURT ON GRANTING A DECREE FOR TEMPORARY MANDATORY INJUNCTION.

FARIS, J.

The question, gentlemen, has not come before the Court yet upon its merits; it has come before the Court upon an issue which, in a way, is a bald technicality. But that is not for the Court. The Court sits here to determine the questions which are presented to the Court.

The issue is made here (referring to what I have denominated as a bald technicality) that the Government of the United States is a proper party, that the Government of the United States is not made a party, and it is urged that the Government of the United States cannot

be made a party in this suit, absent its own volition, which it has not seen fit to exercise.

There are debatable questions of law in the case. There is not a single debatable question of fact in it, gentlemen. The bald facts are, that Mr. Goltra, in May, 1919, made a contract with the Government of the United States, one side says. The other side says it was made with certain individuals representing the Government of the United States. I might go further and say that the other side, that is to say, the plaintiff in the case, denies that the Government of the United States is a party. I question whether it makes much difference or not. That contract, among other things, provided (stating it substantially, because I have not got it before me), that in the event of default in the terms thereof on the part of Mr. Goltra, the Government of the United States, or the lessor, whoever it was (and I will say to you now I do not care very much) should have the option or privilege of taking these boats.

There came a day in 1922 or 1923 (at least the question of this issue became crucial in 1923) when the Government said to Mr. Goltra, "You have not lived up to your contract. You have not complied with the terms of it, and therefore we have a right to abrogate it, to cancel it, to declare it at an end, and ask of you the return of these barges."

Mr. Goltra said, "You are in error about that. I have done everything, under the circumstances, which my contract requires me to do. You have no right to take them."

Just there, gentlemen, a justiciable question arose between these parties, the same question that would arise if Jones were to say to Brown, "You have my hundred and sixty acres of land; give it to me." Brown says, "It is not your land." Jones says, "It is. I will go and take it," and Jones goes and takes it *vi et armis*. Now, that is the bald situation in the case.

There were proceedings at law, gentlemen, known of all men who are lawyers, by which the question legally could have been determined whether the contention of the lessor in this case was true or whether the contention of the lessee in this case was true.

The terms of the contract are plain. If the plaintiff, Goltra, had not complied with the contract then the Government had the right to take these boats, but the Government did not have the right, or the lessor did not have the right; nobody had the right to take them as long as it was an issuable contention between the lessee and the lessor as to whether the lessee had complied or not. Clearly, here, Colonel Ashburn, now General Ashburn, acting under the orders of the Secretary of War, took those boats without any legal authority. There is not any question about that. The evidence is too plain to quibble about it, or too plain even to discuss it for a moment. Clearly, Colonel Ashburn had no right to take them as long as there was an issue requiring the intervention of the courts to decide whether Goltra was right in his contention or whether the lessor was right in its contention. That is too plain, gentlemen. I have no patience with the mental workings of anybody, be he lawyer or layman, who would assert to the contrary.

The Secretary of War, in my opinion, had no more right to order Colonel Ashburn to take these barges and these boats, if objection were made to that taking (and the proof in this case shows that there was objection made to their taking) than any private citizen would have any right to take the horse of another if that other claimed to own that horse, or claimed the right of possession to that horse.

I am not blaming General Ashburn in the case, because General Ashburn did what I believe I would have done if I had been an officer in the United States Army and had

been requested by my superior to perform a certain duty. I should perform that duty if I could. But that does not make any difference. That simply is a sentimental question, which prevents any blame from attaching to the acts, personally, of General Ashburn. The question goes back farther than that: Did the Secretary of War have any right to take the law into his own hands and to send an officer of the United States Army to take by force; to take without authority, the property claimed by a private citizen? That question is too plain, gentlemen, for argument. Undoubtedly he had no such right.

Since the Government of the United States is not a party, since no decision of this question can be had without its presence, and since it arbitrarily refuses to come in, this situation arises: That the Government of the United States, through its officers (if the defendants' position be correct) may violate every provision of law and every provision of the Constitution that has ever been written into law, decided by the courts as being law, or written into the Constitution, and then go unwhipped of justice. All that is necessary is for some man calling himself an administrative or executive officer of the Government to assume arbitrary powers when he acts as an officer of the Government; do what he pleases touching the rights of citizens, yea, touching their constitutional rights, and then say, "I was acting for the Government. The Government is not a party. The Government will not become a party. You cannot touch me in law for that."

Now, gentlemen, that situation is unthinkable. It is unthinkable to say that an officer of the United States, be he the Chief of the War Department; be he the Chief of Engineers; be he the United States District Attorney, or be he what he may, may assume to act for the United States Government in derogation of the liberties of the people of the United States; in derogation of their constitutional rights, and then say, "You cannot touch us. The

Government of the United States ought to be a party; it is not a party, and it will not become a party. You cannot make it become a party. Therefore your constitutional rights and your liberties as free men are whistled down by the wind and go for naught."

You cannot do that in this country, gentlemen; that thing cannot be done in this country, and that day when that thing can be done in this country marks twelve o'clock for this country as a republic. There is no use in discussing that. That is the situation here.

Now, I take this position: That neither the Secretary of War, a defendant here; nor Colonel Ashburn, a defendant here; nor Mr. Carroll, who is a defendant here by courtesy, at least, but whose interest it is hard to appreciate at this stage of the case, can assume to act for the United States Government when they do things not permitted to be done by an officer of the United States Government, or to be done by the Government itself. The great Government of the United States cannot be said to be standing under cover and permitting its officers to do in its name a thing of the monstrous and outrageous character shown by the evidence in this case.

This matter came up in the case of Lee v. United States. I cited that case in a former opinion. In my opinion, as a lawyer and as a judge, the situation here is far more flagrant than it was there. There a man by the name of Kaufman held for the United States certain property. Other officers of the United States (not Kaufman, I believe, but others who had had something to do with the subject-matter) acted in a like outrageous way. The result of their outrageous and monstrous actions was that Kaufman was put into possession of certain property as the keeper and custodian thereof for the United States. Justice Miller, one of the greatest justices who ever sat on the Supreme Court of the United States, said that the

Government could not be said to be behind an officer, who said he was acting for it, and who assumed to be acting for it, when that officer transgressed the laws of the United States, and transgressed the Constitution of the United States.

I think that is the rule, or rules, which govern here. I may be mistaken about it. It may be true that by simply standing out and permitting (if I may use the word; which is not the correct one) an officer to do for it an unconstitutional thing, a monstrous thing, an outrageous thing, the Government of the United States may profit and prosper, but I do not believe that when an officer of the United States acts unconstitutionally, acts illegally, the United States can be said to be behind what he is doing. If the United States, then, was not behind these men (and it was not behind them unless they were doing lawful things) then the United States cannot be said to be a party.

I pass over, then, the question of title, the question of who was the lessor; whether it was the United States, or whether it was somebody else. In a former opinion, after looking at all the law I could find upon the subject, and all the statutes I could find upon the subject, I came to the conclusion that under the authority of the Emergency Shipping Board case, that the United States was not a proper party here. I am still of that view; if necessary, I shall continue to so rule. But I say to you, for the reasons that I have thus lamely given, that I doubt seriously whether it makes any difference, because (to close upon that point as I began) if officers of the United States, in the name of the United States, can do things of the kind that were here done; can arbitrarily do these things; can take the property of a citizen regardless of the courts, and without resorting to the courts, while they say to others, "You must be law-abiding. You must go

into court, you must not take the law into your own hands," then this republic cannot long endure under that species of tyranny.

A somewhat serious point of law arises in the case, gentlemen, by reason of the fact that it is somewhat unusual to ask for injunctive relief when you ask for no other relief. That is a debatable question in the case. I treat that thus: This is in the nature of a mandatory injunction, an injunction commanding the restoration of the *status quo*. I think that the law will reach it, even though it be not within the power of the Court, under the pleadings here and under the evidence here, to decide the merits of this case. The merits, I repeat, as I said in the beginning, have not been touched on in this case. I think it is within the power of a court of equity, in a case where a mandatory injunction is asked, to require those who have done an illegal thing to undo that illegal thing, and thus preserve the *status quo*. If it is not the law then the circumstances in the case presented here disclose a regrettable situation, to characterize it by no stronger word.

Those are the two points in the case, gentlemen. One is: Is the United States an absolutely necessary party here? I say it is not, because I think that by no stretch of the imagination can it be truly said that the United States Government is countenancing, is ordering, is urging, those who assume to act in its name to do things of this character.

Upon the other question, I think it is within the Court's power, as the Court has already said, where a mandatory injunction is asked merely for the purpose of preserving the *status quo*, to act without looking legally into the case and merits thereof. I could not get to those merits here because there is no proof offered upon either side about them.

So, I am going to issue a temporary mandatory injunction in this case, commanding the defendants in this case to restore these boats and barges to the possession of the plaintiff, Goltra, and such orders and judgments in the case as the proofs and pleadings will admit. You may prepare a decree to that end.

To which ruling of the Court, the defendants, by their counsel, then and there, at the time, duly excepted.

Which was all the evidence offered and heard on the application for a temporary injunction.